Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

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COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION
WT Docket No. 99-217 and CC Docket No. 96-98

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SUMMARY

The United States Telephone Association ("USTA") believes that the FCC should not and cannot mandate access to buildings and rooftops: (1) under Section 224; or (2) as an Unbundled Network Element ("UNE"). USTA also addresses nondiscriminatory access to facilities controlled by the premises owner and other building access issues.

The FCC is in error in characterizing incumbent local exchange carriers as having bottleneck control over "interconnection."

In this proceeding, the FCC seeks to address whether it is appropriate, and whether it has the requisite jurisdiction to ensure that competitive telecommunications service providers will have reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple tenant environments ("MTEs"). Commission action to exert jurisdiction over building owners would be inappropriate and unlawful. Further, USTA believes the FCC previously reached the appropriate result when it declared that:

> access to inside wiring through the incumbent LEC's [Network Interface Device ("NID")] does not entitle a competitor to deliver its loop facilities into a building without the permission of the building owner. Similarly, access to an incumbent LEC's NID does not entitle the competitor to the riser and lateral cables between the NID and individual units within the building, which may be owned or controlled, for example, by the premises owner. (Citation omitted; emphasis added.)

Section 224 does not give the FCC any authority, explicit or implicit, to exert jurisdiction over building owners. This is in contrast to section 255 of the 1996 Act, which gave the FCC specific and narrow authority to regulate manufacturers of telecommunications equipment or customer premises equipment to enable access by the disabled to the public switched telephone network (47 U.S.C. § 255(b)). USTA believes, the FCC's ancillary or other plenary jurisdiction cannot and should not be asserted in the area of private property rights; and that the FCC lacks subject matter jurisdiction over premise/building owners. Consistently, USTA does not believe the FCC can exercise Title I jurisdiction over a building owner.

FCC Chairman Kennard apparently does not believe that section 224 confers sufficient authority on the FCC to treat private access to MTEs through riser cable and inside wire as public right of way. Chairman Kennard, publicly acknowledged that the agency does not have the requisite

jurisdiction to address competitive telecommunications carrier access to MTEs. *See* "A New FCC for the 21st Century" (Aug. 12, 1999). Commissioners Ness, Furchtgott-Roth and Powell also express concern about exerting jurisdiction over premises owners in this matter.

The American system of private property rights is the hallmark of a democratic and market-driven society. USTA believes the FCC should defer to the United States Congress or the states in matters governing private property rights.

The FCC should not modify its current approaches to the demarcation point and sub-loop unbundling at the remote terminal or at other points within the incumbent LEC's network. As to whether the FCC's rules governing access to cable inside wiring for a multichannel video programming distributor ("MVPDs") should be extended so as to afford similar access to providers of telecommunications services and vice versa, the FCC should comprehensively examine convergence issues in another proceeding which is designed to solely focus upon convergence matters.

If the FCC determines jurisdiction is appropriate and requires access to conduit or riser cable "owned" or "controlled" by an ILEC, USTA believes the FCC must consistently apply the same requirements it imposes on ILECs to CLECs, including government owned competitive telecommunications operations.

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COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

I. Introduction

The United States Telephone Association ("USTA"), as the principal trade association for the local exchange carrier industry, on behalf of its members, respectfully files these comments before the Federal Communications Commission ("FCC" or "Commission") in response to the Commission's notice of inquiry and third further notice of proposed rulemaking in the above-

captioned proceeding.[1] USTA also incorporates by reference, its comments from other proceedings which relate to the issues raised in this matter.[2]

In this proceeding, the FCC seeks to address whether it is appropriate, and whether it has the requisite jurisdiction to ensure that competitive telecommunications service providers ("CLECs") will have reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple tenant environments such as apartment and office buildings, office parks, shopping centers and manufactured housing communities ("MTEs").

Specifically, the Commission seeks to address in this proceeding whether section 224 of the Telecommunications Act of 1996[3] is applicable to riser conduit and private license agreements between the building owner and the ILEC; or whether the access the building owner provides to the ILEC is an easement for which the FCC can consider to be public and for which the FCC can require competitive telecommunications provider access to such a right-of-way in MTEs that ILECs may

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[1]*Notice of Proposed Rulemaking and Notice of Inquiry in WT docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98* ("NPRM") (adopted, Jun. 10, 1999; released, July 7, 1999; with the date extended by *Order Extending Pleading Cycle* (adopted and released, Aug. 6, 1999).

[2]*See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (USTA comments filed before the FCC on May 16, 1996; and USTA Reply Comments, May 30, 1996; USTA Comments on Dialing Parity/Number Administration Technical Changes/Access to Right of Way" (May 20, 1996); *In re Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98 (USTA Comments, June 27, 1997; and reply comments, Aug. 11, 1997); and "Comments of the United States Telephone Asssociation" in CC Docket Nos. 96-98 and 95-168 (May 26, 1999)[USTA comments in the UNE Remand Proceeding; replies were also filed].

[3]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at*, 47 U.S.C. §§ 151 *et seq.* ("1996 Act"). The 1996 Act amended the Communications Act of 1934 (the "Communications Act").

"own or control;" whether there are any unbundled access requirements in the context of riser cable or wiring that the ILEC may own or control in MTEs for which the FCC can allegedly exert section 251 authority over; and whether there is a need for the FCC to facilitate competitive access to MTEs.

II. Comments

Section 224 of the 1996 Act is a specific provision that requires utilities, including ILECs, to provide cable television systems and telecommunications carriers with nondiscriminatory access to any pole, duct, conduit, or right-of-way that they own or control. Section 224 does not contemplate access to conduits or premises owned by any other persons. Moreover, conduit has traditionally referred to underground conduit, but has never referred to in-building conduit or riser conduit.[4] Further and more pointedly, ILECs do not own or control in-building conduit or riser conduit, unless ILECs own the building.

To promote the goals of the 1996 Act, the FCC must have a lawful basis for its actions. And, it must ensure that the public interest is not made subordinate to the actions it takes to achieve this goal.

> **(A) The Competitive Networks of the Future** (the mis-characterization of ILEC "bottleneck control over interconnection").

A general premise in this proceeding is that "as a practical matter, the incumbent LECs exert bottleneck control over interconnection, an essential input to the carriage of telecommunications."[5]

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[4]*See* FCC rule 32.2241(a) (conduit systems): "This account [under Part 32 concerning uniform system of accounts for telecommunications companies] shall include the original cost of conduit, whether underground, in tunnels or on bridges, which is reusable in place. It shall also include the cost of opening trenches and of any repaving necessary in the construction of conduit plant." 47 C.F.R., Ch. 1, § 32.2441(a).

[5]NPRM at ¶ 21.

ILECs do not and can not, exert bottleneck control over interconnection. This is contrary to the nature of the plain meaning of interconnection, the basic thrust of sections 251-253 of the 1996 Act.

The plain meaning of the term "interconnection" in the statute refers only to the facilities and equipment physically linking two networks, and not to the transport and termination services provided by such linking. Section 251 of the 1996 Act governs interconnection for the transmission and routing of telephone exchange service and exchange access.

Under section 251, competitive local exchange carriers ("CLECs") have three options to achieve service provision: CLECs can interconnect their facilities with that of the ILEC;[6] CLECs can obtain, on a nondiscriminatory basis, unbundled access to any of the ILEC's network elements at any technically feasible point[7]; or CLECs can elect to purchase for resale at wholesale rates any telecommunications service that the ILEC provides at retail to subscribers who are not telecommunications carriers.[8] Interconnection must be equal in quality to that which the ILEC provides to itself or any other party, and it must be at rates that are non-discriminatory and that meet the requirements of section 252.[9] Interconnection agreements are each negotiated between the ILEC and the party seeking interconnection with an ILEC. Such agreements entail arm's length negotiations between parties. Mediation and arbitration by a state commission can be sought under section 252(a)(2) to resolve any disputes between the parties.

The notion that you can have an ILEC bottleneck control over interconnection must be dis-

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[6]47 U.S.C. §251(c)(2).

[7]47 U.S.C. §251(c)(3).

[8]47 U.S.C. § 251(c)(4).

[9]*See* 47 U.S.C. § 251(c)(2)(A)-(D).

spelled. Congress enacted section 251 specifically to establish terms and responsibilities regarding opening local networks to competition, thereby specifically precluding even the possibility of bottleneck control. Theoretically there can be bottleneck control over facilities or calls. However, it is theoretically and legally impossible to have bottleneck control over interconnection.

(B) Access to Buildings and Rooftops.

The NPRM states that:

> In general, incumbent LECs provide service to multiple-unit buildings by connecting their networks to a [Network Interface Device ("NID")], which is typically located in the basement or on the ground floor. Signals are transported from the NID to locations on each story of the building by means of riser cable, and to individual units by inside wire. In order to reach individual units, competing carriers typically need access either to the existing riser cable and inside wiring, or to riser conduit and other building space in which to place their own facilities, or both.

NPRM at ¶ 34. The FCC detariffed inside wire in 1986.[10]

To the extent the FCC believes it should take action to promote access to buildings and rooftops in this docket, USTA submits that the FCC must do so consistent with its lawful authority and the public interest. "[The FCC] is not at liberty, however, to subordinate the public interest to the goals outside the ambit of the Communications Act.[11]

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[10]Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, *Memorandum Opinion and Order*, 1 FCC Rcd. 1190, 1192-93, ¶¶ 13-18 (1986); *see also*, NPRM at ¶ 56.

[11]*Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974). "[E]qualization of competition is not itself a sufficient basis for Commission action." *W.U. Telephone Co. v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981).

(1) Access Under Section 224.

Pursuant to section 224 of the 1996 Act, utilities, including ILECs, must provide cable television systems and telecommunications carriers with nondiscriminatory access to any pole, duct, conduit, or right-of-way that they own or control.[12] Basically, USTA believes the FCC previously reached the appropriate result when it declared that:

> access to inside wiring through the incumbent LEC's NID does not entitle a competitor to deliver its loop facilities into a building without the permission of the building owner. Similarly, access to an incumbent LEC's NID does not entitle the competitor to the riser and lateral cables between the NID and individual units within the building, which may be owned or controlled, for example, by the premises owner.[13]

Section 224 does not give the FCC any authority, explicit or implicit, to exert jurisdiction over building owners. USTA believes that the FCC has neither plenary nor ancillary jurisdiction in the area of private property rights raised in the NPRM.[14] *See, e.g., Bell Atlantic v. FCC, 24 F.3rd 1441 (D.C. Cir. 1994).* Nor does USTA believe the FCC can exercise Title I jurisdiction over a building owner (as suggested in the NPRM at ¶ 56), since such an action is far outside the Commission's ancillary authority. USTA agrees with both Commissioners Furchtgott-Roth and Powell that the FCC lacks jurisdiction over building owners and landlords in this matter. Commissioner Furchtgott-Roth

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[12]NPRM at ¶ 36.

[13]*In re Implementation of Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98); Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers (CC Docket No. 95-185),* Order on Reconsideration (FCC 96-394)(adopted and released, Sept. 27, 1996) at n.853.

[14]*See* NPRM at ¶ 57.

is "deeply troubled" that the Commission is seeking to use its ancillary jurisdiction under Sections 4(i) and 303(r) of the Communications Act to permit access to any telecommunications provider to privately owned buildings in this proceeding.[15] Commissioner Powell believes "this is not an area where we should be pushing the envelope of our 'ancillary' statutory authority . . . ." [16]Congress's specific language in section 224, not to mention section 251, no where provides even a basis for the FCC to assert Title I jurisdiction over owners of private buildings or the conduits or wiring within those buildings. Section 224 is silent with respect to building owners,[17] in contrast to section 255 of the 1996 Act which gave the FCC specific and narrow authority to regulate manufacturers of telecommunications equipment or customer premises equipment to enable access by the disabled to the public switched telephone network.[18]

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[15]NPRM, Statement of Commissioner Harold Furchtgott-Roth, concurring in part and dissenting in part ("Furchtgott-Roth Statement"). Citing to *Bell Atlantic v. FCC*, 24 F.3rd 1441 (D.C. Cir. 1994), Commissioner Furchtgott-Roth, cautions that:

> [T]his Commission must be vigilant in overstepping its authority where private property rights are implicated, being careful not to regulate where it does not have specific statutory authority -- regardless of whether such regulations constitutes commendable public policy. I fear that today's proposal [in the NPRM], if ultimately adopted by the Commission, may stray outside this agency's jurisdictional boundaries. [*Id.*]

[16]NPRM, Separate Statement of Commissioner Michael K. Powell, Concurring ("Powell Statement").

[17]Commissioner Powell also believes the relevant statutes lack specificity to enable the FCC to regulate building owners and landlords: "Assuming one believes it is permissible to use such plenary jurisdiction to regulate a building owner or landlord, those powers seem to lack the specificity the law requires before treading onto constitutionally protected turf." *See supra* note 16.

[18]47 U.S.C. § 225(b).

USTA takes issue with the NPRM's statement that in-building facilities may be controlled by the ILEC, the building owner, or both.[19] In privately owned buildings not owned by ILECs, ILECs specifically do not own conduit or the structures surrounding riser cable, which may include the closets or common areas. In some cases, ILECs have to cut holes in concrete to place the riser cable or wiring and certainly must obtain permission from the building owner in order to do this. However, USTA believes the FCC correctly determined that section 224 does not confer a general right of access to utility property and that that decision should not be disturbed;[20] in that decision, the FCC established that section 224 does not mandate that a utility make space available on the roof of its corporate offices for the installation of a transmission tower.[21]

Basically, USTA believes what is relevant here is who controls access to the building. Even to the extent that the ILEC may own the riser cable, ultimately, the building owner controls access to the building and therefore the locus of control over the building and/or to the ILEC's in-building facilities resides with the building owner. As the United States Supreme Court has ruled, "[i]t is true that one of the essential sticks in the bundle of property rights is the right to exclude others."[22]

A building owner can terminate its relationship with the ILEC and pay money damages, if appropriate. Property owners also have a right to seek damages from trespassers, which an ILEC can become.[23] Certainly, the building owner can sell the building without the ILEC's permission. Thus,

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[19]NPRM at ¶ 30.

[20]NPRM at ¶ 40 and n.89.

[21]*See Local Competition First Report and Order, 11 FCC Rcd. At 16084-85, ¶ 1185.*

[22]*Kaiser Aetna v. United States,* 444 U.S. 164, 179-180 (1979).

[23]Citation omitted.

the ILEC's interest does not necessarily run with the land, to the extent that the right to be on the building owner's land is a license,[24] as opposed to an easement.[25] Generally speaking, other parties aside from an ILEC, may use in-building conduit with permission from the conduit owner. Such parties could include alarm companies, CPE providers, individual tenants of the building, computer companies, companies that provide local area networks and other business entities who provide services to the building and its tenants, as well as the building owner.

Contrary to the FCC NPRM's assertion,[26] Section 224 governs non-discriminatory access to public, **but not private,** rights-of-way (to the extent that riser cable constitutes a right of way as a form of an easement, as opposed to a license which USTA believes the grant of building access entails, except in limited circumstances where actual easements were in fact granted (e.g., in

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[24]According to *Black's Law Dictionary,* a license in real property concerns a privilege to go on the premises for a certain purpose, but does not operate to confer on, or vest in, licensee any title, interest, or estate in such property; a license is distinguished from an "easement," which implies an interest in the land, and a "ease," or right to take the profits of land; it may be, however, and often, is coupled with a grant of some interest in the land itself, or right to take the profits; a license is a permit to use a street is a mere license revocable at pleasure; and, a licensee is one who is privileged to enter or remain upon land by virtue of possessor's consent, whether given by invitation or permission. *Black's Law Dictionary* at 830 (Special Deluxe Fifth Ed. 1981).

[25]According to *Black's Law Dictionary*, an easement is a right of use over the property of another. Traditionally, the permitted kinds of uses were limited, the most important being rights of way and rights concerning flowing waters. The easement was normally for the benefit of adjoining lands, rather than for the benefit of a specific individual. A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property owner. *Black's Law Dictionary* at 457 (Special Deluxe Fifth Ed. 1981).

However, some ILECs may have actual easement grants in very limited circumstances such as in underground conduits between buildings on college campus settings.

[26]NPRM at ¶¶ 41-47.

underground conduit between buildings on college campus settings.)). Consistently therefore, USTA disagrees with the NPRM's current pronouncement (which directly contradicts the agency's earlier view, as quoted above at 6) that section 224 encompasses access to rights-of-way[27], conduit, and risers on private property, including end user premises in MTEs, that utilities, including ILECs, own or control.[28] In the FCC's amended rule 51.5 regarding terms and definitions, the word "premises" is defined as follows:

> "Premises" refers to an incumbent LEC's central offices and serving wire centers, as well as all buildings or similar structures owned or leased by an incumbent LEC that house its network facilities, and all structures that house incumbent LEC facilities on public rights-of-way, including but not limited to vaults containing loop concentrators or similar structures.[29]

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[27]*See e.g.*, in *in re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396 (F.C.C. 1977), the FCC defined the meaning of section 253(c) as follows:

> [S]ection 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way . . . [T]he types of activities that fall within the sphere of appropriate rights-of-way management . . . include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of various systems using the rights-of-way to prevent interference between them.

Id., *cited in, Bell Atlantic-Maryland, Inc. v. Prince George's County*, (Civil No. CCB-98-4187), Order at 24 (U.S. Dist. Ct., MD, May 25, 1999).

[28]NPRM at ¶ 39.

[29]*See* Appendix B - Final Rules, Amendments to the Code of Federal Regulations, Part 1 of Title 47 of the Code of Federal Regulations (C.F.R.) as cited at

Areas in private buildings have never been considered public rights-of-way, nor should they because such precedent might not only be a taking, but may also go against the very foundation of the American property ownership system.[30]

It also appears that FCC Chairman Kennard does not believe that section 224 confers sufficient authority on the FCC to reach property owners or to allow public access to MTEs through riser cable and inside wire. On August 12, 1999, Chairman Kennard delivered to Congress his strategic plan for the 21st Century, which, *inter alia*, requested Congress to establish a new amendment to the 1996 Act, and also to amend an existing penal provision of the statute (section 207 pertaining to recovery of damages against a common carrier), in order to enable any proper FCC regulatory authority in the area of MTEs. *See* "A New FCC for the 21st Century" (Aug. 12, 1999). Specifically, the Chairman asked Congress to give the FCC authority to provide competitive telecommunications provider access to MTEs when a resident requests competitive service from a CLEC and seeks to terminate its service provider relationship with the ILEC. *Id.* at 38.

Private property rights are fundamental, constitutional rights guaranteed to all United States citizens (including corporations).[31] The American system of private property rights is the hallmark

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http://www.fcc.gov/ccb/local_competition/append_b.html.

[30]States have traditionally regulated public rights-of-way and imposed conditions and restrictions. Also, *see e.g.*, Charles Donahue, Jr. Thomas E. Kauper and Peter W. Martin, *Property: An Introduction to the Concept and the Institution,* "The Marxist Attack and the Liberal Response--Herein of Property Rights v. Civil Rights" *at 230-273* (West Publishing Co., 2d ed., 1983) cited here as support for the notion of a liberal and market-based system of property ownership.

[31]*See e.g.*, the 5th and 14th Amendments to the United States Const.

of a democratic and market-based society.[32] USTA believes the FCC should defer to the United States Congress or the states in matters governing private property rights. The FCC can ill afford to intrude on the rights of private property holders.

(2) Access as an Unbundled Network Element ("UNE").

The FCC cannot unilaterally impose additional unbundling obligations on ILECs. The *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721 (1999)("Iowa Utilities Bd.") decision requires the FCC to weigh unbundling against the "necessary" and "impair" standard of section 251(d)(2). That section was intended to limit ILEC unbundling obligations. It is inappropriate for the FCC to seek to impose new unbundling obligations on ILECS in a piecemeal manner when it has not even decided the scope of unbundling in the UNE remand proceeding. USTA agrees with both Commissioner Furchtgott-Roth that "the better course of action . . . would be to consider all issues pertaining to unbundled network elements in one proceeding."[33]; and Commissioner Powell who is concerned about "adding yet another possible network element to a list that the Supreme Court struck down without the thorough interpretation and application of the necessary and impair standards of section 251(d)(2)" with respect to unbundled access to riser cable and wiring.[34] Commission Powell also said that the FCC should bear in mind the 8th Circuit Court review and ultimate decision on UNEs before deciding in this proceeding to impose additional, unwarranted unbundling obligations on ILECs.[35]

Pursuant to section 253(c)(3) of the 1996 Act, and consistent with *Iowa Utilities Board*, an

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[32]Citation omitted.

[33]NPRM, Furchtgott-Roth Statement.

[34]NPRM, Powell Statement.

[35]*Id.*

ILEC must make available to any requesting carrier nondiscriminatory access to network elements on an unbundled basis at any technically feasible point under just, reasonable, and nondiscriminatory rates, terms and conditions.[36] In determining what network elements should be made available under this provision, the FCC is directed to consider, at a minimum, (a) whether access to such network elements as are proprietary in nature is necessary, and (b) whether the failure to provide access would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.[37]

At ¶ 50 of the NPRM, the FCC seeks comment as to whether it should require unbundling of facilities owned by the incumbent LEC on the end user's side of the demarcation point, as well as sub-loop unbundling at the remote terminal or at other points within the incumbent LEC's network.

USTA urges the FCC to avoid a mandatory minimum-point-of-entry ("MPOE") regime. It believes it is more appropriate for the FCC to evaluate such issues addressing all types of inside wire used to provide telecommunications/cable/video services, etc. in a comprehensive docket that addresses convergence issues.

Even if riser cable is owned or controlled by an ILEC and serves to extend that ILEC's reach or distribution network, no party has shown that riser cable or conduit have met the requisite "necessary and impair" standard. USTA believes the FCC should not address the issue of whether riser cable/conduit constitute UNEs in this proceeding. Instead, it should do so, if at all, in the UNE

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[36]47 U.S.C. § 251(c)(3).

[37]NPRM at ¶ 49; and 47 U.S.C. § 251(d)(2).

remand proceeding and avoid a piecemeal approach to determining UNEs.[38]

While proponents of subloop unbundling had identified the feeder, distribution, and feeder/distribution interface and the NID as the appropriate subloop elements, the FCC has previously declined to require subloop unbundling.[39] In that proceeding, the FCC found that the proponents of subloop unbundling failed to address certain technical issues raised by ILECs; consequently, the FCC felt subloop unbundling was best addressed at the state level on a case-by-case basis.[40] In particular, the FCC recognized that access by a competitor's personnel to loop equipment necessary to provide subloop elements, such as the Feeder Distribution Interface (FDI), raise network reliability concerns for customers served through that FDI.[41] Those concerns remain true today.

Certainly to the degree the Commission is contemplating subloop unbundling at the NID, or a Remote Terminal (RT), or the end user's side of the demarcation point or at other points within the ILEC's network in order to access MTEs, the Commission should consider that there are significant disadvantages to such unbundling, with the paramount concern being diminished network reliability. It is well-established that coordination has been problematic for competing utilities digging up streets and inadvertently slicing trunk cable. Similarly, multiple providers provisioning portions of the loop

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[38]Implementation of the Local Competition Provisions in the Telecommunications act of 1996, CC Docket No. 96-98, *Second Further Notice of Proposed Rulemaking,* FCC 99-70 (rel. Apr. 16, 1999)(UNE Further NPRM).

[39]*In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers (respectively, CC Docket No. 96-98; and 95-185), First Report and Order,* ("FR&O").

[40]Id., FR&O at ¶ 391-392.

[41]*Id.*

could thwart network integrity and service quality. Multiple providers would need access to FDIs (cross-connect cabinets) or RTs (which may be located in a cabinet or underground vault). Outages have occurred when a technician accesses a cross-connect box, due to the introduction of moisture and dirt, as well as general "wear and tear" of the facilities.

Subloop unbundling at the FDI or RT may not be physically possible for some loops. For example, some loops may contain very little feeder, while others contain little distribution. Other may utilize FDIs, while others do not. Some are provisioned on fiber cable and Digital Loop Carrier systems, some are provisioned on copper, while others include both fiber and copper, etc.

Unbundling at the FDI would require a substantial redesign of cross-connect cabinets in order to accommodate additional termination blocks to terminate the feeder plant of many new entrants. It is likely that such unbundling will require the installation of additional cabinets (perhaps one to serve each provider). An additional common cabinet would be required to provide a physical location where the CLECs would cross-connect their feeder plant to an ILEC's distribution plant. This redesign could be quite extensive. Further, unbundling at the FDI could result in a significant loss in efficiency.

The costs to re-engineer parts of the loop and develop operational support systems for subloop elements will raise the price of subloop elements to prohibitively high levels.[42] With subloop unbundling, each carrier would have to test its own portion of the loop. This could be very inefficient and expensive. Given these concerns, such subloop unbundling would not lend to accomplishing the 1996 Act's goal of promoting efficient, competitive and competitively priced telecommunications

[42]*See supra* notes 35-37 regarding relevant portions of the FR&O.

services; and could run counter to the public interest in sustaining a reliable network.

(3) Access under non-discriminatory access to facilities controlled by the premises owner.

The Commission acknowledges in its NPRM that sections 224 and 251(c)(3) do not provide access to areas or facilities controlled by the premises owner. However, the FCC has asked whether building owners who allow access to their premises to any provider of telecommunications services should make comparable access available to all such providers under nondiscriminatory rates, terms, and conditions.[43] USTA believes, the FCC's ancillary or other plenary jurisdiction can not and should not be asserted in the area of private property rights.[44] *See, e.g., Bell Atlantic v. FCC, 24 F.3rd 1441 (D.C. Cir. 1994).* Nor does USTA believe the FCC can exercise Title I jurisdiction over a building owner (as suggested in the NPRM at ¶ 56) for the same reason it provided, above. Moreover, Commissioner Ness also expressed concern about the FCC's attempting to exert non-discriminatory access over building owners and cited another instance involving access to building common and rooftop areas for placement of over the air video reception devices, where the Commission elected to forbear from exerting jurisdiction over building owners (citing the *OTARD Second Report & Order* and Section 207 of the 1996 Act).[45] To the degree the Commission believes it has authority under section 224 or other relevant provisions cited in this docket to exert non-

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[43]NPRM at ¶ 53.

[44]*See* NPRM at ¶ 57. To the extent that a tenant may seek to override a building owner's right to determine who comes on the property, the FCC's insertion between the tenant and the building owner could prove thorny. In that regard, the FCC could find itself to be an unwilling participant in private housing and real estate disputes that would waste its resources and provide no public benefit.

[45]NPRM, Separate Statement of Commissioner Susan Ness.

discriminatory access requirements over private building owners, which USTA does not believe it has such authority, USTA believes the FCC should forbear from exerting such jurisdiction in this matter, as well.

The FCC has asked whether its rules governing determination of the demarcation point between facilities controlled by the telephone company and by the property owner on MTEs under Part 68 of its rules impact competitive provider access and whether any modification or clarification of those rules is appropriate to promote access. USTA believes that the status quo approach is appropriate at this time; and that regardless of how the FCC repositions/restates the issue, it does not have subject-matter jurisdiction over building owners and no change in the demarcation point or the MPOE can, by itself, serve to alter that fact.

If the FCC determines jurisdiction is appropriate, which is not so, and requires public access to conduit or riser cable, USTA believes the FCC must consistently apply the same requirements it imposes on ILECs to all CLECs, including government owned competitive telecommunications operations.[46] In that regard, USTA supports competition must be equitable.

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[46]While the issue of government owned networks is not raised directly as an issue in the NPRM, USTA believes it is implicit and that it is incumbent upon the FCC to address the issue of parity between government networks and non-government networks in regards to this matter. Consistent with its adopted policy, USTA is on record for supporting fair competition with government owned networks (*see e.g.*, Roy M. Neel, USTA President and CEO letter to the honorable Conrad Burns of the United States Senate (regarding Section 316 of the House-passed Energy & Water Appropriations bill; USTA argues against allowing the use of Federal funds by the Federal power marketing administrations to provide commercial telecommunications services (Aug. 4, 1999)); and USTA Small Company Dispatch 3-99, "USTA Adopts Principles on Government Competition with Telecommunications Providers" (Feb. 9, 1999)).

(4) Access: Other Building Access Issues.

The FCC has asked whether its rules governing access to cable inside wiring for a multichannel video programming distributor ("MVPDs") should be extended so as to afford similar access to providers of telecommunications services and vice versa. In that regard, the NPRM states that a strong argument can be made for applying uniform rules governing access to inside wiring regardless of a provider's service technology or the form of its authorization.[47] The FCC should refrain from reaching such a decision in this proceeding, but should comprehensively examine any convergence issues in a proceeding that solely focuses upon convergence matters.

III. Conclusion.

USTA urges the Commission to take action as recommended by USTA in this matter.

Respectfully submitted,

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[47]NPRM at ¶ 68.